IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1183

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

BRIEF OF AMICUS CURIAE

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IN THE

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OCTOBER TERM, 1972

No. 72-1188

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Reserve Officers Association, a federally chartered corporation (64 Stat. 313, 36 USCA 221 (1950)) is committed by the terms of its charter to the support of a military policy for the United States that will provide adequate national security, and to promote the development and execution thereof (64 Stat. 313,

USCA 223 (1950)). The Association, in 36 USCA 224, is vested with the right to sue and be sued. The Association's aim is to keep America strong in a perilous world. As such, any attack which would lessen ROA's ability to serve the nation is a matter to be contested. Both your Petitioner and Appellee have consented to the filing of this Brief, Amicus Curiae (See Appendices).

The Association has reviewed your petitioner's brief for certiorari and enthusiastically supports the views expressed therein. Since your petitioner has so ably set forth the extant law on the question there appears to be no need for repetition.

Rather, since the issue presented to this Court is whether there is a constitutional question meriting review by the highest tribunal in the land, we would direct our comments to another aspect for the Court's consideration.

APPELLEE'S POSITION

Appellee in his Brief accompanying his complaint to the District Court for the District of Columbia, says there is not a constitutional question involved, citing as reasons a possible conflict of interest situation, and asserting a conviction that our Constitution as put together by the Framers thereof, laid down rules which create possible inconsistent obligations on the part of a member of Congress if he holds a Reserve Commission. In addition, the Appellee infers there can be no doubt that the Framers did not intend to place members of the legislative branch of the government in a position to determine whether or not such a conflict exists, without any outside interference.

STATEMENT

While it is quite true the Framers' end product (U.S. Const., Art. I, § 6) would seem to indicate some thought along the lines set out in the preceding paragraph, the fact is there was considerable discussion on this point which resulted in a compromise Article which, in its first section, refers to a "civil" office and in its second section to "any" office. Assuming they meant to bar a legislator from holding any "office" in another branch of the government, they could only have arrived at such a position based on what was extant at the time (as regards "military" offices).

The Constitution as finally arrived at in 1787 provided in Article 1, Section 8 for the organization of a militia, and reserved to the States the appointment of officers. The second Amendment to the Constitution provided that the right to bear arms by the people who were to constitute the to-be organized militia would not be infringed. It follows that the Framers were thinking in terms of various State militias in contrast with today's federal reserve forces. The Congress was given the power to raise and support armies but the reserves were to be composed of militiamen drawn from the various State populations for the purpose of suppressing insurrections and repelling invasions (U.S. Const., Art. 1, § 8). The President was designated as Commander in Chief of the Army and Navy of the United States but no provision was made for the establishment of a Federal Army and Navy Reserve. It is clear that, so far as the Framers were concerned, such a Reserve would be composed of the militia of the several states. As pointed out by the lower court, the Framers were concerned about the availability of members of the legislative body for military service on the

grounds that experienced soldiers (officers) could very well be the best men in the event of insurrection or invasion and therefore ought not, simply because they were members of the Congress, be foreclosed from military service. These fears were not so much for the individual as they were for the good of the new country.

Because of these objections the originally proposed clause quoted by the Court below as follows:

> "The members of each House shall be ineligible to and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards"

was changed in a compromise move, to read:

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office".

Since the compromise wording was apparently satisfactory to the majority of the Framers including those who had raised the objections to the proposed language, the acceptable wording became part of our Constitution.

We believe it fair to say that the militia as it existed or was about to exist in 1787 is not comparable in any fashion to today's Reserve forces. The Officers' Reserve Corps did not come into being until 1916 (National Defense Act, June 3, 1916, § 37, 39 Stat. 776, 10

USC 351 (1916). Thus we see that the Federal Reserve Forces are creatures of Congress, and are neither provided for nor contemplated by the Constitution.

CONGRESSIONAL ACTION

The Congress of the United States, in its legislative capacity, further declared specifically, in the National Defense Act (National Defense Act, June 3, 1916, Section 37, 39 Stat. 776, 10 USC 372 (1916), that

> "Members of the Officers' Reserve Corps, while not on active duty, shall not, by reason solely of their appointments, oath, commissions, or status as such, or any duties or function performed or pay and allowances received as such, be held or deemed to be officers or employees of the United States or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States."

Appellee's attack is really aimed at this provision, terming it unconstitutional based on the inferred intent of the Framers of our Constitution.

In addition, the Court's attention is drawn to 80 Stat. 409, 5 USC 2105(d) (1966). Once again, Congress has by definition, held that reservists are not office holders. The section is quoted as follows:

> "(d) A reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity."

Thus we see that the Congress, presumably within the framework of the whole law including the Constitu-

tion, has very carefully eliminated an inactive officer reservist as an "office holder" and has thereby, since both statutes (5 USC 2105(d); 10 USC 372) are for a specific purpose or situation, indicated an unwillingness to erode the expressed intent of the Constitution.

It seems anomalous to state that Congress has by itself created an instrument that will diminish its own power, and that this situation can only be corrected by the courts. To hold thus would be indeed an attack upon the maturity and good intentions of the Congress. In this particular situation, Congress, if an evil exists (and the Congress would be the first to feel this evil), can undo what they have done, by appropriate legislation. In addition, the Constitutional power to pass on the qualifications of their own members can be invoked (U. S. Const., Art., § 5; cf. 1 Hinds, *Precedents of the House of Representatives,* 592-603, 612, 620-632 (1907); 6 Cannon, *Precedents of the House of Representatives,* 67, 69 (1936).

CONCLUSION

The Supreme Court should grant certiorari, should reverse the holdings below, and declare that the matter is properly one for Congressional action, if action is indicated. The Constitutional powers of Congress to legislate, and to pass on the qualifications of its own members should be the only controlling factors in this case.

Respectfully submitted,

THOMAS H. KING
805 Fifteenth Street, N. W.
Washington, D. C. 20005
Attorney for Reserve Officers Association

APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

February 14, 1973

Thomas H. King, Esq.
King, Biddle and Shapiro
805 Fifteenth Street, N.W.
Washington, D. C. 20005

Re: Laird, et al. v. Reservists Committee
to Stop the War, et al.

Dear Mr. King,

In response to the request in your letter of February 12, I hereby consent to your filing a brief amicus curiae in the above-captioned case, on behalf of the Reserve Officers Association.

Very truly yours,

/s/ ERWIN N. GRISWOLD
Erwin N. Griswold
Solicitor General

APPENDIX B

WILLIAM A. DOBROVIR
2005 L STREET, N.W.
WASHINGTON, D. C. 20036
(202) 293-1544

March 8, 1973

Thomas King, Esq.
Southern Building
15th and H Streets, N.W.
Washington, D. C. 20005

Dear Mr. King:

Respondents in *Richardson* v. *Reservists Committee to Stop the War*, U.S. Supreme Court, October Term 1972, No. 72-1188, consent to the Reserve Officers Association filing a brief amicus curiae therein.

Very truly yours,

/s/ WILLIAM A. DOBROVIR
William A. Dobrovir

WAD:nye